IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

WP(C).No. 11878 of 2007(L)

CC.763/2002 of J.M.F.C.-II, ERNAKULAM

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PETITIONER:

MOIDEEN SHAH, S/O. MARAKKAR SHAH,
NOW RESIDING AT 'SHAH NIVAS',
EDAPPALLY, KOCHI-25.

BY ADV. SRI.JOSHI N.THOMAS

RESPONDENTS:

DR. JOSEPH MATHEW,
PALLITHANAM, RESIDING AT SACRED HEART HOSPITAL
QUARTERS, GREEN GARDENS, CHERTHALA P.O.,
ALAPPUZHA DISTRICT.

BY ADV. SRI. S. KRISHNAMOORTHY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 25/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

R. BASANT, J.

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W.P.C.No. 11878 of 2007 L

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Dated this the 25th day of May, 2007

JUDGMENT

Against the petitioner, a complaint has been filed on 10.10.2002 by the respondent herein alleging commission of the offences punishable under Section 138 of the N.I. Act. It was filed prior to 10.10.2002 and has been posted from 10.10.2002 to 2.3.2007. On all dates upto 19.1.2006 the complainant was not present. But the court went on adjourning the case. However, after receipt of notice as ordered on 19.1.2006, the complainant has started appearing before the learned Magistrate. The case is making further progress before the J.F.C.M.-II, Ernakulam.

2. The petitioner has now come to this Court raising a grievance against the Magistrate's conduct of not dismissing the complaint from 10.10.2002 to 19.1.2006 though the complainant was never present. The complaint must have been dismissed under Section 256 Cr.P.C. earlier, it is submitted. This is the short point urged before me.

3. The learned counsel for the respondent/complainant is also present before court in connection with I.A. 4129 of 2007 in O.P. 8091 of 2003. The learned counsel for the respondent submits that it is evident as day light that the complainant was under the bonafide, but erroneous impression that the case was pending before the Addl. C.J.M., Ernakulam and that is why he did not appear before the J.F.C.M.-II, Ernakulam till he received notice as ordered on 19.1.2006.

4. Section 256 Cr.P.C. is only an enabling provision and it is not the law that in every case for the absence of the complainant the axe must fall on the case and the complaint must be dismissed. Section 256 Cr.Pl.C. does not take away the real, reasonable and effective discretion which a Magistrate has when he considers whether a complaint must be dismissed under Section 256 Cr.P.C. or not. In the facts and circumstances of this case it is very evident that the learned Magistrate had only acted to advance the interests of justice when he did not choose to close the case by invoking the powers under Section 256 Cr.P.C. The complainant had come to this court with O.P. 8091 of 2003 to complain that the present complaint, which he thought had been filed before the Addl. C.J.M. Ernakulam, had

not been taken on file. In these circumstances I am satisfied that the petitioner is not entitled for any relief.

5. This Writ Petition is accordingly dismissed.

(R. BASANT)
Judge

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